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In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN FUELS ASSOCIATION, INC. AND MOON LAKE ELECTRIC ASSOCIATION, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 7

Conclusion 10

CITATIONS

Cases:

NAACP v. *New York*, 413 U.S. 345 8

NRDC v. *Costle*, 561 F. 2d 904 9

Stallworth v. *Monsanto Co.*, 558 F. 2d 257 9

United Airlines, Inc. v. *McDonald*, 432 U.S. 385 9

Statutes and rule:

Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, Section 4, 90 Stat. 1083 3

Mineral Lands Leasing Act of 1920, Section 2(b), 30 U.S.C. 201(b) 5

National Environmental Policy Act of 1969, Section 102(2)(C), 42 U.S.C. 4332(2)(C) 2

30 U.S.C. 201(b) 3, 4

Fed. R. of Civ. P. 60(b) 5

Page

Miscellaneous:

13 Weekly Comp. of Pres. Doc. (May 30, 1977) 4

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OPINIONS BELOW

The memorandum and order of the court of appeals (Pet. App. 8a-10a) are unreported. The order of the district court (Pet. App. 7a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1978. The petition for a writ of certiorari was filed on December 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the district court did not abuse its discretion in denying petitioners' motion to intervene in this case.

STATEMENT

1. In 1971, the Secretary of the Interior imposed a general moratorium on new leasing of federal coal deposits. He subsequently announced that a comprehensive review of federal coal leasing policy would be undertaken, during which limited short-term leasing would be allowed. In August 1975, the Secretary issued a final programmatic environmental impact statement (PEIS) analyzing the environmental consequences of several alternative national coal leasing policies for lands under the Secretary's jurisdiction. In October 1975, Natural Resources Defense Council, Inc. (NRDC), filed this lawsuit claiming that the final PEIS was not adequate to fulfill the Secretary's responsibilities under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). NRDC sought an injunction to prohibit implementation of the new federal coal leasing program until an adequate PEIS was prepared.

Of the several coal industry representatives that submitted comments during the preparation of the PEIS, only one interested industry member—Utah Power and Light Company—then sought permission to intervene in the lawsuit. Utah Power was granted leave to intervene in January 1976 and has remained a party to the litigation since that time.

2. Several months after the lawsuit was filed, the parties submitted motions for summary judgment accompanied by extensive supporting material.[1] In September 1977, the district court granted NRDC's motion for

[1]The summary judgment motions were heard by the district court in July 1977. At that time, the court indicated that, unless an agreement by way of stipulation was submitted soon, it would have to enter an order granting NRDC's motion (Tr. of July 5, 1977, at 57-60).

summary judgment. The court held that the final PEIS failed adequately to examine alternatives to the proposed coal leasing program (Pet. App. 27a-30a). The court enjoined the Secretary from "taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases" (*id.* at 35a). The district court recognized, however, that some interim coal leasing would be necessary during the time that the PEIS was under revision and the program decision was under reconsideration. Consequently the court excepted from its injunction proposed leases "required to maintain an existing mining operation at present levels of production" and proposed leases "necessary to provide reserves necessary to meet existing contracts" (*ibid.*).

3. During the period that the litigation was pending in the district court, President Carter came into office and directed the Secretary to insure that the national coal leasing program will allow mining only in areas where mining is environmentally acceptable and compatible with other land uses. Specifically, the President directed the Secretary to scrutinize all existing leases and lease applications to decide whether it is likely that these will be developed in a timely and environmentally acceptable manner and to take necessary steps (1) to reevaluate the basis for granting or denying preference right leases;[2] (2) to exchange unsatisfactory leases and applications for equivalent rights to environmentally acceptable federal coal lands; and (3) to submit legislation to authorize

[2]Petitioners have pending applications for preference right leases under 30 U.S.C. 201(b). In August 1976, Congress abolished the Secretary's authority to issue preference right leases, subject to rights under existing lease applications and permits. Section 4 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083, 1085.

condemnation of leases if necessary to prevent environmental damage. 13 Weekly Comp. of Pres. Docs. 782, 785 (May 30, 1977).

In response to this directive, the Secretary initiated a comprehensive review of federal policy in July 1977 and ordered implementation of the national coal leasing program to be delayed pending completion of the policy review. At the time the district court entered its injunction in this case, the Executive Branch had thus independently determined not to proceed with the national coal leasing program that was the subject of the court's order.

The Secretary remained concerned, however, that the limited exceptions provided for interim coal leasing in the court's injunction were considerably more restrictive than the short-term leasing program the Secretary deemed necessary to sustain on-going operations.[3] The Secretary concluded that more flexibility for interim leasing was necessary during the period that a new PEIS was being prepared and a new program implemented, and the Secretary accordingly filed a timely notice of appeal.

4. While the appeal was pending, the Secretary entered into negotiations with NRDC in an effort to obtain agreement on a modification of the original injunction to expand the exceptions available for on-going mining operations pending completion of the national policy review. In February 1978, the Secretary and NRDC reached agreement on expanded exceptions for interim leasing and applied to the district court for a modification

[3]The Secretary had extensively revised his short-term leasing criteria to prevent abuses of the intent of those criteria. The Secretary also brought preference right leasing back within the coverage of the short-term criteria. Federal Defendants' Memorandum of July 25, 1977. (In 1976, the Secretary had lifted the restrictions of the short-term criteria for preference right leasing upon issuing regulations defining the "commercial quantities" of coal that must be shown to exist before preference right leasing can occur under 30 U.S.C. 201(b).

of the original injunction pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

5. After the Rule 60(b) motion was submitted to the district court, petitioners filed their initial motion to intervene in this case. Petitioners informed the court that they desired to adopt the legal position "abandoned" by the Secretary and would seek reversal of the court's injunction in its entirety (Mem. in Support of Motion to Intervene, March 13, 1978, at 12-15). Petitioners also advised the court of their contention that the Secretary has a non-discretionary duty to issue leases to petitioners as applicants for "preference" leases under Section 2(b) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 201(b). See note 2, *supra*.

The district court rejected petitioners' motion to intervene. The court noted that the case was then still pending in the court of appeals and that it therefore lacked jurisdiction over petitioners' motion (Pet. App. 1a). Petitioners then filed a petition for a writ of mandamus in the court of appeals, seeking an order directing the district court to exercise jurisdiction over their motion to intervene. This petition was denied by the court of appeals (*id.* at 2a).

6. Thereafter, the district court notified the court of appeals that it desired a remand of the case in order to modify its injunction pursuant to the request of the Secretary and NRDC. Petitioners moved to intervene in the court of appeals to oppose the proposed modification of the injunction, again arguing that they had a right to immediate issuance of leases.

On May 19, 1978, the court of appeals remanded the case to the district court to allow the court to consider the Rule 60(b) motion. At the same time, the court of appeals denied petitioners' motion to intervene, observing (Pet. App. 5a) that petitioners sought to raise issues previously decided by the district court in its original decision and

order.[4] The court of appeals noted that the arguments petitioners proposed to raise if they were allowed to intervene (Pet. App. 5a n.2)

> concern the alleged "non-discretionary, mandatory duty to issue a lease," Memorandum in opposition to Remand at 28. Those arguments would reopen the validity of the [district court's initial decision], as the District Court noted and Utah Power and Light conceded. Tr. of Hearing of April 3, 1978, at 59. Thus, intervention by appellants would reopen a key matter which has been previously litigated and decided.

The court of appeals also noted that petitioners' interests in this case were substantially protected by the participation of Utah Power and Light Company, which is also an applicant for "preference" leases and has raised "virtually identical" arguments (Pet. App. 6a).

7. Upon remand of the case to the district court, petitioners renewed their motion to intervene. This motion was again denied (Pet. App. 7a). The district court then entered an order amending its original injunction in accordance with the proposed modification jointly requested by the Secretary and NRDC (*id.* at 37a-45a). In entering its order, the district court again made clear that the injunction was applicable to the processing

[4]In its initial decision, the district court rejected the argument that "preference" leasing should be considered outside the scope of the national leasing program. The court found that the PEIS consistently referred to "preference" leasing as part of the national program and that no evidence had been offered to refute that finding. Consequently, the court stated (Pet. App. 31a n.22):

> For the purposes of this injunction and compliance with NEPA, "preference right" leasing will also be enjoined until the Programmatic EIS deficiencies are remedied.

and issuing of "preference" leases (Pet. App. 48a) (see also note 4, *supra*):

> The modification of the [injunction] * * * violates no existing rights of preference lease applicants. This is because under the [original] Order, they have no right to have their applications processed at all, and under the modified order they have no right to have their applications processed by the Secretary in any particular sequence or in any particular period of time.

8. Petitioners appealed from the denial of their motion to intervene, and the court of appeals affirmed (Pet. App. 8a-10a).[5] Noting that the merits of the original and the modified injunction are "considerably intertwined," the court concluded that the district court had not abused its discretion in denying intervention to petitioners because intervention at this late date "* * * would reopen prior decisions on key issues to the prejudice of existing parties to the suit" (*id.* at 9a).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' motion to intervene. The decision in this case is not in conflict with any other decisions and further review by this Court is unwarranted.

Petitioners claim (Pet. 17) that the district court abused its discretion in denying their motion to intervene because, once the Secretary "abandoned" his defense of the action, they should be permitted "to fill the void left by the retreating federal litigant." Petitioners argue that

[5]The appeal filed by Utah Power and Light Company from the district court's decision on the merits is still pending in the court of appeals. See page 8, *infra*.

their motion to intervene was timely because it was filed soon after they learned of the Secretary's agreement to consent to the modified injunction.

As this Court stated in *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), however, whether a motion for intervention is timely under Rule 24

> is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review [footnotes omitted].

The circumstances of this case support the district court's determination that petitioners' motion was not timely. First, the action taken by the President and the Secretary to reevaluate the national coal leasing policy, to suspend implementation of the national leasing program pending completion of the policy review, and to reimpose the short-term leasing program, occurred more than one year prior to petitioners' efforts to intervene in this litigation. To the extent that the Secretary may have altered his position subsequent to the initiation of this litigation, that change occurred substantially before petitioners sought to intervene. Moreover, as the court of appeals noted, petitioners seek to "reopen prior decisions on key issues to the prejudice of existing parties to the suit" (Pet. App. 9a). In particular, they seek a determination that "preference" leases are to be granted to them as a matter of right without regard to environmental considerations (*id.* at 5a n.2)—a claim that the district court has expressly rejected on two occasions (*id.* at 31a n.22, 48a). Finally, petitioners' contentions on the merits of this litigation are before the court of appeals in the appeal filed by Utah Power and Light Company. *NRDC* v. *Hughes*, No. 78-1656 (D.C. Cir.). As the court of appeals stated (Pet. App. 5a-6a), petitioners' interests "are substantially protected by the participation of Utah

Power and Light in the suit, since it, like them, is a prospective preference right lessee, and it has raised arguments virtually identical to theirs." There is thus no compelling reason to excuse petitioners' tardy application for intervention at this late stage of the litigation.[6]

The court of appeals fully examined the record and concluded that denial of intervention in the particular circumstances of this case was not an abuse of discretion (Pet. App. 9a). There is no reason for this Court to review this fact-oriented determination of the courts below.

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[6]Petitioners claim that the decision in this case conflicts with *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977); *Stallworth* v. *Monsanto Co.*, 558 F. 2d 257 (5th Cir. 1977), and *NRDC* v. *Costle*, 561 F. 2d 904 (D.C. Cir. 1977). These cases, however, are distinguishable. In *United Airlines* and *Stallworth*, intervention was allowed after settlement where no party in the suit remained to represent the interests the potential intervenor and the class the intervenor proposed to represent. In this case the proposed intervenors are represented by a party still actively engaged in litigating its claims. Moreover, here, unlike in *United Airlines* and *Stallworth*, it does not appear that the proposed intervenors acted immediately upon the change of position by the litigants. See page 8, *supra*. In *NRDC* v. *Costle*, intervention was deemed timely where the intervenors did not seek to reopen settled issues but proposed to participate only in the remedial phase of the case involving implementation of the final judgment. Here, by contrast, petitioners propose to challenge determinations made by the district court in both its original and modified injunctions. See page 8, *supra*. Each of the circumstances that distinguish this case from the decisions on which petitioners rely supports the discretionary determination of the district court to deny intervention in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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